Press Freedom v. Privacy
Newsworthiness in a Self-Publishing Era
A Talk with Professor Amy Gajda

- Changing understanding of newsworthiness and privacy
  - First Amendment
    - Provides broad but not absolute freedom of press protections. Press freedom exists to a certain extent. There is a limitation on what is truthful and publishable.
    - Provides in relevant part: *Congress shall make no law… abridging the freedom of speech, or of the press*.
  - A right to privacy and press freedoms
    - Louis Brandeis and Samuel Warren most famously articulated the right of privacy in their 1890 law review article, arguing that we have a "right to be let alone."[1]
    - Changing tide in favor of media protection: *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).
      - Libel case about whether First Amendment free speech and press rights limit the government's power to award damages in a libel action brought by a public official against critics of his official conduct. Requires "actual malice."
      - Raised the bar for defamatory tort recovery against the media by requiring that public officials show false statements were made with malice.

- Privacy intrusion torts
  - Publication of private facts
    - Generally, publication of private facts torts involve information that it private, highly offensive, and is not a matter of public concern (not newsworthy).
      - E.g. nudity or sexual information traditionally protected – highly offensive to the community and is not a matter public concern.
  - Restatement (Second) of Torts, § 652D Publicity Given to Private Life
    - *One who gives publicity to a matter concerning the private life of another is subject to liability to the other for invasion of his privacy, if the matter publicized is of a kind that (a) would be highly offensive to a reasonable person, and (b) is not of legitimate concern to the public*.
    - Elements:
      - Public disclosure
      - Of a private fact (not generally known)

[1] Samuel D. Warren & Louis D. Brandeis, The Right to Privacy,4HARV. L. REV. 193, 193, 214–15 (1890).

- Offensive to a reasonable person
    - E.g. nudity or sexual information has traditionally been considered highly offensive and not a matter of public concern
- Not newsworthy

▪ Restatement suggests that information that's published must have been private. Does that mean there's no privacy in a public space? Courts seem to suggest that there is still privacy in a public space.

- Suggests that information that's published must be private information. What about in a public space: is there a reasonable expectation of privacy in a public space?
    - ▪ Foster v. Svenson[2]
        - Defendant Arne Svenson, a fine art photographer, took photographs of residents in the building across from his in Manhattan, NY, using a telephoto camera lens. He obscured the subjects' faces in the photographs and presented them in a series he titled "The Neighbors" in galleries in LA and NY. He stated that the subjects did not know they were being photographed, and he intentionally hid in the shadows in the dark in his apartment. Plaintiffs' children, aged three and one, were photographed in their diaper and swimsuit. The children were identifiable in the photographs. The photographs were offered for sale on defendant's website. Plaintiffs sued claiming statutory invasion of privacy and intentional infliction of emotional distress. Defendant asserted that the photographs were art and therefore protected by the First Amendment. The trial court sided with the defendant.
        - The Appeals court found that art falls outside the prohibitions of the NY privacy statute under the newsworthy and public concern exemption. Civil Rights Law § 50 prohibits the use of a person's "name, portrait or picture" with criminal penalties for such prohibited uses. Prohibits the use of a person's "name, portrait, picture or voice" (Civil Rights Law § 51) for advertising or trade purposes and gives individual victim of such appropriation the right to obtain an injunction and bring a cause of action to obtain compensatory and exemplary damages. There is a newsworthiness and public concern exemption because such dissemination or publication is not deemed strictly for the purpose of advertising or trade within the meaning of the privacy statute. Since works of art convey ideas, they fall under this

[2] 2015 NY Slip Op 03068: http://www.courts.state.ny.us/reporter/3dseries/2015/2015_03068.htm

exemption. Because New York law does not recognize publication of private facts or intrusion into seclusion and only looks at misappropriation (the misuse of someone's identity), the defendant prevailed.

- Related torts
  - Restatement (Second) of Torts, § 652B, Intrusion upon seclusion
    - *One who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the intrusion would be highly offensive to a reasonable person*.
  - Intentional or negligent infliction of emotional distress is also often brought with privacy infringement related claims.

- Newsworthiness
  - In the tort context, proving newsworthiness is a defense to a publication of private facts claim.
  - Journalists' standards of newsworthiness
    - Society of Professional Journalists publishes a guideline ethics code.[3] It provides in relevant parts:
      - Balance the public's need for information against potential harm or discomfort. Pursuit of the news is not a license for arrogance or undue intrusiveness.
      - Recognize that legal access to information differs from an ethical justification to publish or broadcast.
      - Realize that private people have greater right to control information about themselves than public figures and others who seek powers, influence or attention. Weigh the consequences of publishing or broadcasting personal information.
  - Bollea v. Gawker Media
    - Now defunct online gossip website Gawker Media published Terry Bollea (Hulk Hogan)'s sex tape which was filmed without his knowledge and consent. Hogan first filed suit in federal court, which determined it did not have jurisdiction because of incomplete diversity. He filed suit in state court, requesting an injunction. The trial court granted the injunction, which was then reversed by the appellate court which ruled that it was within Gawker's discretion to publish the video. At trial, the jury found in favor of Bollea and awarded him $140 million in damages. The parties then settled for #31 million.
  - Post-*Bollea*

[3] See Society of Professional Journalists Ethics Code: https://www.spj.org/ethicscode.asp

- Erin Andrews case: Andrews v. Marriott International, et al. Circuit Court for Davidson County, Tennessee (2016)
    - Sports reporter Erin Andrews was staying at The Blackwell Inn, a Marriott hotel, when Michael Barrett secretly recorded her in her room through the door peephole. Michael Barrett had called the hotel to confirm that Andrews was staying at the hotel and requested the room next to hers. Blackwell granted the requests. At the hotel, Barrett retrofitted the peephole on Andrew's door to record the room. He posted the videos online.
    - Andrews sued the hotel and its affiliates and Barrett, claiming negligent infliction of emotional distress and invasion of privacy. The jury awarded Andrews $55 million, finding Barrett 51% liable and the hotel companies 49%. Because Barrett would not likely have been able to pay his share of the $55 million, the hotel companies could have been responsible for the full amount. The hotel companies settled with Andrews for an undisclosed amount.
- Pierre-Paul v. ESPN Inc., No. 16-21156-Civ-COOKE/TORRES, 2016 WL 4530884, at *1 (S.D. Fla. Aug. 29, 2016).
    - Jason Pierre-Paul, then a New York Giants player, brought an invasion of privacy suit against ESPN and sports journalist Adam Schefter. Jason Pierre-Paul lost a finger on his right hand from a fireworks accident. Adam Schefter obtained a copy of his medical chart that showed the amputation and tweeted it. Pierre-Paul claimed that publication of his medical chart violated his statutory right against invasion of privacy.
    - ESPN's motion to dismiss was denied. In considering a motion to dismiss, the federal court noted that the amputation could be newsworthy but that the medical chart was not newsworthy because it was protected information under HIPAA.
    - The parties settled prior to trial.
- Jackson v. Mayweather, 10 Cal.App.5th 1240 (2017)
    - Boxer Floyd Mayweather posted on social media that his former girlfriend Shantel Jackson had broken up because she had an abortion and uploaded a sonogram of the twin fetuses and the related medical report. The next day, he discussed Jackson's abortion during a radio interview and stated that she had had extensive cosmetic surgery. Shantel Jackson sued Mayweather claiming invasion of privacy (both public disclosure of private facts and false light), defamation and intentional and negligent infliction of emotion distress.

- *The order denying the special motion to strike is reversed with respect to Jackson's causes of action for defamation and false light portrayal and her cause of action for public disclosure of private facts based on Mayweather's statements that she had an abortion and his comments about cosmetic surgery. In all other respects the order is affirmed*.

- What are some other types of information that may be newsworthy?
  - Newsworthy
    - Information of popular appeal
    - Wartime photographs
  - Non-newsworthy
    - Morbid and sensational prying for its own sake
    - E.g. Autopsy photos of deceased child. *See* Marsh v. County of San Diego, 680 F.3d 1148 (9th Cir. 2012).
    - E.g. Photographs taken in public of a person's skirt blowing up. *See* Daily Times Democrat v. Graham, 162 So. 2d 474 (1964).

- Quasi-journalists
  - Gajda refers to gossip or blogger publications like Gawker as quasi-journalists, making the distinction with traditional journalists that abide by ethics codes.
  - When decisions made by quasi-journalists to publish may lead to eroding free press protections
    - Quasi-journalists operate on different or no ethics codes.
    - Whenever decisions come down on the side of privacy on cases involving the bad actions of quasi-journalists, press freedoms on the whole are also eroded.

- Websites that feature mugshots
  - Mugshots have historically been treated as newsworthy but websites have been cropping up that are blurring the line. Some mugshot websites have no substance content other than the mugshots. The mugshots are posted merely to drive traffic. Other mugshot websites are more predatory; they may require that individuals pay to have the mugshot removed from the website.
  - While courts have generally not ruled on this issue, a lower level trial court in Pennsylvania ruled that criminal history information about a crime committed a long time ago is not newsworthy. *See* Hartzell v. Cummings, No. 150103764, 2015 WL 7301962, at *1 (Pa. Ct. Com. Pl. Nov. 4, 2015).

Additional Resources:

- Gajda, Amy, The First Amendment Bubble: How Privacy and Paparazzi Threaten a Free Press (June 5, 2017). Gajda, Amy. The First Amendment Bubble: How Privacy and Paparazzi Threaten a Free Press (Harvard University Press 2015).; Tulane Public Law Research Paper. Available at SSRN: https://ssrn.com/abstract=2981112

- Gajda, Amy, Privacy, Press, and the Right to Be Forgotten in the United States (2018). 93 Washington Law Review 201 (2018); Tulane Public Law Research Paper No. 18-2. Available at SSRN: https://ssrn.com/abstract=3144077